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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 836.

DORIS M. BROWN, *et al.*,
Petitioner,

vs.

OHIO POWER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR OHIO POWER COMPANY IN OPPOSITION.

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OPINIONS.

The opinion of the Supreme Court of Ohio (App. A) is reported at 177 Ohio St. 45. The opinion of the Court of Appeals for the Third Appellate Judicial District, Hancock County has not been reported. Only the journal entry of said court was before the Supreme Court of Ohio (R. 13).

JURISDICTION.

The decision of the Supreme Court of Ohio was entered on November 4, 1964. The petitioner does not state in her petition on what basis she contends jurisdiction exists. Respondent denies that any jurisdiction exists.

QUESTION PRESENTED.

Does the Supreme Court of the United States have jurisdiction to review the decision of the Supreme Court of Ohio in this matter?

STATEMENT.

(a) Proceedings in the Court of Common Pleas of Hancock County, Ohio.

This case arose as the result of a petition to appropriate property filed pursuant to Chapter 2709 of the Ohio Revised Code in the Court of Common Pleas of Hancock County, Ohio, by the respondent herein on September 25, 1962. Thereafter, the defendants, Doris M. Brown, Betty Lou Friedhoff and Helen L. Mosgrove, were duly served with summons (R. 7). The latter two defendants being non-residents of the State of Ohio were served by registered mail pursuant to Ohio Revised Code, Section 2703.23, and Rule 5 of the Court of Common Pleas of Hancock County, Ohio. Such service is permitted in Ohio in actions in rem. *Cupp et al. vs. Commissioners,* 19 Ohio St. 173.

On Friday, November 23, 1962, at 4:24 P. M., an Affidavit of Prejudice or Interest of Judge was filed with the Clerk of the Court of Common Pleas of Hancock County by the petitioner (R. 3). Such an affidavit is permitted by Ohio Revised Code Sec. 2701.03 but must be filed not less than three days prior to the time set for the hearing in such matter or cause (App. B). The matter came on for trial at 9:00 A.M. on Monday, November 26, 1962. At that time the Honorable Dan Batt, Judge of said Court by assignment, ruled that the Affidavit of Prejudice or Interest of Judge was not timely filed, and that since a jury had been summoned, and all witnesses, attorneys, and parties, were present, the case should proceed (R. 5). The case was then tried before a jury and a verdict was returned fixing the amount of compensation due the defendants in the case (R. 8-11).

(b) Proceedings Before the Court of Appeals for the Third Appellate Judicial District, Hancock County.

The defendants, including the petitioner, appealed to the Court of Appeals for the Third Appellate Judicial District, Hancock County. The Court of Appeals considered the assignment of error wherein the petitioner alleged that the trial court erred in overruling the petitioner's Affidavit of Prejudice or Interest of the Judge at the commencement of the trial. The Court of Appeals sustained this assignment of error and held that said affidavit was timely filed and that the trial judge did not have the authority to overrule it. The Court of Appeals therefore reversed and remanded the judgment entered by the trial court (R. 13).

(c) Proceedings Before the Ohio Supreme Court.

The respondent filed a motion to certify with the Supreme Court of Ohio which was allowed. After presentation of briefs and oral argument, the Supreme Court of Ohio reversed the judgment of the Court of Appeals and rendered final judgment for the respondent (App. A).

ARGUMENT.

It is the contention of the respondent that this Honorable Court should deny the petition for writ of certiorari for want of jurisdiction. There was only one issue before the Supreme Court of Ohio and it concerned solely the interpretation of a state statute; there is no federal constitutional question in this case.

The only issue passed upon by the Court of Appeals was whether or not the trial court had the authority under Ohio Revised Code, Sec. 2701.03 to overrule an Affidavit of Prejudice or Interest of Judge filed pursuant to said

statute. The trial court had been of the opinion that it had, but the Court of Appeals was of the opinion that it did not have such authority and that such action on the part of the trial court constituted prejudicial error. It was precisely this issue—the interpretation of a local court's authority under a state statute and whether the exercise of such authority constituted prejudicial error—that was presented to the Supreme Court of Ohio. This is the only issue shown by the Record in this case, and this issue certainly does not present a federal question which would give this Court jurisdiction over the matter.

It has long been settled that the existence of a federal question is essential to this Court's jurisdiction to review a state decision, and it is a jurisdictional requisite that this shall appear on the face of the record of the case as it comes from the state court. *Neblett v. Carpenter,* 305 U. S. 297, 83 L. Ed. 182, 59 Sup. Ct. 170; *Mellon v. O'Neil,* 275 U. S. 212, 72 L. Ed. 245, 48 Sup. Ct. 62; *Whitney v. California,* 274 U. S. 357, 71 L. Ed. 1095, 47 Sup. Ct. 641. An examination of the Record in this case will reveal that these prerequisites have not been met.

The respondent respectfully invites this Court to examine the contents of the Affidavit of Prejudice or Interest of Judge which appears on page 3 of the Record. We are confident that this Court will agree with the Supreme Court of Ohio that the affidavit is frivolous and a sham. It raises no constitutional issue in any way, shape or form. The *only* basis of prejudice alleged by the petitioner in her Affidavit was that Judge Batt had a prejudice against the petitioner because of his membership in the Ohio State Bar Association! Certainly it is patently evident that this Affidavit is both frivolous and a sham. No one could sincerely or seriously contend that merely because a judge is a member of the Ohio State Bar Association he there-

fore has a prejudice against an individual whom he does not even know. It is to be noted that *nowhere* in the Record or in the Affidavit of Prejudice is there any other fact of prejudice of Judge Batt alleged. It is incredible that this petitioner would allege the Supreme Court of Ohio denied her constitutional rights in branding this Affidavit as what it is—frivolous and a sham, yet she did so in this case.

Under the law of Ohio it is firmly established that in order to justify the reversal of a judgment appealed on questions of law, the record must affirmatively show not only that error has intervened, but that it was to the prejudice of the party seeking to have the matter reviewed. *McHugh v. State,* 42 Ohio St. 154; *Fabian v. State,* 97 Ohio St. 184; *Makranczy v. Gelfand,* 109 Ohio St. 325; *Brockmeyer v. Cincinnati Dowel & Wood Products Co.,* 71 O. App. 514. Thus, the general rule is that to warrant a reversal, an error must have been prejudicial to the substantial rights of the complaining party. Moreover, in Ohio Revised Code, Sec. 2309.59, the Ohio Legislature has laid down the statutory policy to the general effect that reviewing courts shall not reverse judgments of lower courts for errors or defects which do not affect the substantial rights of the complaining party.

The Supreme Court of Ohio followed this doctrine in ruling that although the trial judge had no authority to rule upon the Affidavit, his action in overruling it was not prejudicial to the petitioner. Thus, the decision of the Supreme Court of Ohio was based solely upon the application of state law. There was no federal question presented nor was it necessary to consider any federal question in order to render the judgment which the Supreme Court of Ohio rendered. Since the decision of the Supreme Court of Ohio rests upon an adequate state ground, this case is

not a proper one for review by this Honorable Court. *Hammerstein v. Superior Court of California,* 340 U. S. 622, 95 L. Ed. 586, 71 Sup. Ct. 521, writ dismissed 341 U. S. 491, 95 L. Ed. 1135, 71 Sup. Ct. 820; *Black v. Cutter Laboratories,* 351 U. S. 292, 100 L. Ed. 1188, 76 Sup. Ct. 824.

The jurisdictional statute, 28 U. S. C. 1257 (3), also requires that claims of federal title, right, privilege or immunity be "specially set up or claimed." Under this provision it has long been held that it is a jurisdictional requisite that such a right or privilege shall have been claimed in the state court, and this must appear on the face of the record. *Mellon v. O'Neil,* 275 U. S. 212, 72 L. Ed. 245, 48 Sup. Ct. 62. Again we should like to note, that nowhere in the Record that was before the Supreme Court of Ohio was any constitutional question specially set up or claimed.

The petitioner in her petition alleged many other supposed violations of her constitutional rights which arose primarily at the trial court stage of this proceeding. Again we wish to briefly refer to 28 U. S. C. 1257 (3) which provides that only final decrees rendered by the highest court of the state may be reviewable. As set forth above, the only issue before the Supreme Court of Ohio related to the Affidavit of Prejudice. Thus this is the only issue which this Honorable Court may consider. There is no authority to consider these other alleged wrongs, which were never considered by the Supreme Court of Ohio and which, we might add, also raise questions of a purely state or local nature.

Before concluding, the respondent is of the opinion that it should comment briefly upon the statements made by the petitioner concerning the fact that the Supreme Court of Ohio reversed the Court of Appeals and entered final judgment for the respondent. Article IV, Section 2 of

the Ohio Constitution specifically provides for reversals of the judgments of lower tribunals by the Supreme Court. Ohio Revised Code, Sec. 2505.37 also provides that "when a judgment or final order is reversed, in whole or part, in the Court of Common Pleas, Court of Appeals or Supreme Court, the reviewing court shall render such judgment as the court below should have rendered * * *." This vests the reviewing court with discretion on reversal to render such judgment as the lower court should have rendered. *Greyhound Lines v. Martin*, 127 Ohio St. 499.

The petitioner complains that certain assignments of error were not passed upon by the Court of Appeals and that "it would have been proper for the Supreme Court to return the case to that court rather than the Common Pleas Court." Actually the Supreme Court of Ohio did not return the case to the Court of Common Pleas, but rather, it entered final judgment for the respondent (App. A). The apparent basis of petitioner's complaint is that certain assignments of error were not passed upon by the Court of Appeals initially and the Ohio Supreme Court did not remand the case to the Court of Appeals for consideration of these other assignments.

Under Ohio law it may be presumed by the Supreme Court of Ohio that the Court of Appeals passed upon all assignments of error presented to it. It must affirmatively appear from the record that all assignments of error were not considered before the Supreme Court upon reversal will remand the case to pass upon such assignments of error; otherwise the presumption controls. *Weaver v. Columbus, Shawnee & Hocking Ry. Co.*, 76 Ohio St. 164; *Peer v. Industrial Comm.*, 134 Ohio St. 61. It did not affirmatively appear from the record in this case that all assignments of error were not considered. The record before the Supreme Court contained the journal entry of

the Court of Appeals which did not make any reference to any other assignments of error (R. 13), but referred only to the Affidavit of Prejudice or Interest of Judge. This entry, it is to be noted, was prepared by the counsel for the petitioner who represented her at that time. Thus, it did not affirmatively appear to the Court that all assignments of error were not considered, but to the contrary, it appeared that only one was presented. Hence, this was not a case to be remanded.

In accordance with the settled principle that a court speaks only through its journal, and that a judgment is not rendered until it is reduced to a journal entry, the Ohio courts hold that judicial opinions do not constitute a part of the record of a case being reviewed. *Summers vs. Thomas Mfg. Co.*, 82 Ohio St. 338; *State ex rel. Sherwood vs. Hoffman*, 95 Ohio St. 144; *State ex rel. Industrial Comm. vs. Day*, 136 Ohio St. 477; *Squire vs. Guardian Trust Co.*, 144 Ohio St. 266. Hence, the opinion of a court will not be consulted to correct supposed errors or deficiencies in the entry of a court's judgment. Reference to the opinion cannot be made to correct a supposed inadvertence in the entry of its judgment and error cannot be predicated on something appearing in the opinion only. *McLaughlin vs. Wheeling & Lake Erie R. Co.*, 61 Ohio St. 279; *Will vs. McCoy*, 135 Ohio St. 241; *McMillen vs. Industrial Comm.*, 34 O. L. Abs. 435; *In re Estate of Ruhl*, 36 O. L. Abs. 250. Even though the opinion of the Court of Appeals in this case indicated that the other assignments of error were not being considered, this fact was not before the Supreme Court of Ohio because the petitioner's counsel failed to so indicate this fact in the journal entry that was part of the record considered by the Supreme Court of Ohio. The Supreme Court of Ohio thus had nothing affirmative in the record to indicate that petitioner had set forth other

assignments of error in her appeal to the Court of Appeals and under the rules of law discussed above, upon reversal of the only assignment of error set forth in the record, the Ohio Supreme Court properly entered final judgment for the respondent.

It is obvious that the issue raised by the above circumstances is not one which presents a federal question. This issue concerns solely a matter of appellate procedure under local law—certainly a state question and not a federal one. Thus, the petitioner has no basis for raising this issue in her petition since the Ohio Supreme Court properly followed Ohio Law in rendering final judgment, and, moreover, there is no federal issue either presented or involved.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Ohio.

This cause originated in the Court of Common Pleas as a proceeding by which the plaintiff, the Ohio Power Company, seeks to appropriate an easement over the lands of the defendants for the purpose of erecting and maintaining a line for the transmission of electricity.

One of the defendants, Doris M. Brown, filed an affidavit of prejudice against the trial judge. She states in her affidavit "that she has been unable to secure justice before members of the Ohio Bar Association for past grievances * * * that to secure justice * * * she must have an assignment of a judge who was not a member of the Ohio Bar Association in 1955 or 1956 when her grievance was ignored * * * that the * * * judge of said court has a prejudice and bias against defendant in this action because of the previous membership and violation of defendant's constitutional rights."

The trial judge overruled the affidavit of prejudice, proceeded to hear the cause and at the conclusion of the hearing entered judgment on the verdict.

The Court of Appeals, on appeal, reversed the judgment for error in overruling the affidavit of prejudice and remanded the cause for further proceedings.

The allowance of a motion to certify the record brings the cause to this Court for review.

Mr. Ralph D. Cole, Jr., Mr. Larry R. Brown and Mr. Robert E. Levitt, for appellant.

Mrs. Doris M. Brown, in propria persona.

Per Curiam. The only basis of prejudice alleged by defendant Doris M. Brown in her affidavit is that the trial judge had a prejudice against her because of his membership in the Ohio State Bar Association. There is no other

fact of prejudice alleged. There is no allegation that the judge ever knew such defendant. She claims that to secure justice she must have an assignment of a judge who was not a member of the Ohio State Bar Association in 1955 or 1956.

It cannot be seriously contended that merely because a judge is a member of the Ohio State Bar Association he has a prejudice against a person he does not even know. The affidavit is frivolous and a sham. If it had been submitted to the Chief Justice for consideration, as the statute then required, the Chief Justice would have been under a mandatory duty to overrule it. See *State, ex rel. Turner, v. Marshall, Chief Justice,* 123 Ohio St., 586. Hence, although the trial judge had no authority to rule upon that affidavit, his action in overruling it was not prejudicial to defendant.

The Court of Appeals was in error in reversing the judgment of the trial court.

The judgment of the Court of Appeals is reversed, and final judgment is rendered for appellant.

Judgment reversed.

TAFT, *C.J.*, ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH, HERBERT and GIBSON, *JJ.*, concur.

APPENDIX B.

OHIO REVISED CODE—§ 2701.03—Disqualification of judge; assignment of judge. (GC § 1687.)

When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the court of common pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause.